

unlawful possession of marijuana for sale in violation of A.R.S. § 13-3405. In 2006, the trial court sentenced him to a six-year prison term on the transportation conviction, to be served concurrently with a four-year prison term on the possession conviction.

¶2 In the sole issue raised on appeal, Santa Maria argues the possession for sale charge was merely “incidental to,” and thus a lesser-included offense of, the transportation for sale charge. Therefore, he contends, his convictions violate the double jeopardy clauses of the federal and state constitutions and constitute fundamental error. *See* U.S. Const. amend. V; Ariz. Const. art. II, § 10; *see also* *Lemke v. Reyes*, 213 Ariz. 232, ¶¶ 16-18, 141 P.3d 407, 413 (App. 2006) (double jeopardy principles prohibit convictions and punishment for both a greater offense and a lesser-included offense); *State v. Siddle*, 202 Ariz. 512, ¶¶ 7-10, 47 P.3d 1150, 1153-54 (App. 2002) (same).

¶3 Based primarily on *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App. 1998), the state acknowledges that “the possession for sale charge is a lesser included offense of the transportation for sale charge, and [Santa Maria’s] conviction and sentence for the possession for sale charge violates double jeopardy principles.” We agree because, as the state also notes, Santa Maria’s “possession of the marijuana for sale was incidental to his transportation of the marijuana for sale.” *See id.* ¶ 12 (“We hold that, when the charged possession for sale is incidental to the charged transportation for sale, it is a lesser-included offense, for a person cannot commit the transportation offense without necessarily committing the possession offense.”);¹ *see also* *State v. Duplain*, 102 Ariz. 100, 102, 425

¹This court recently held that possession of a dangerous drug is not a lesser-included offense of transportation of a dangerous drug for sale because possession requires a showing that the defendant possessed a “useable quantity” of drugs while transportation for sale has no quantity element. *State v. Cheramie*, 217 Ariz. 212, ¶¶ 6-7, 171 P.3d 1253, 1256-57

P.2d 570, 572 (1967) (setting aside conviction for possession of marijuana when possession “was incidental to the sale”); *cf. State v. Sumter*, 24 Ariz. App. 131, 133, 536 P.2d 252, 254 (1975) (no error in submitting to jury both counts of possession of marijuana for sale and transportation of marijuana when trial court sentenced defendant only on possession-for-sale conviction). Comparing the elements of the two crimes here, *see Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d at 1154, Santa Maria could not have committed the transportation for sale offense without also committing the possession for sale offense. *See* § 13-3405(A)(2), (A)(4).

¶4 A double jeopardy violation, as occurred here, constitutes fundamental, prejudicial error. *See State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006); *see also Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 9, 965 P.2d at 96; *State v. Millanes*, 180 Ariz. 418, 421, 885 P.2d 106, 109 (App. 1994). Accordingly, as the state concedes, although the issue was not raised below, Santa Maria’s conviction and sentence for the possession of marijuana for sale charge must be vacated. His conviction and sentence for the transportation of marijuana for sale charge is affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

(App. 2007). But this court in *Cheremie* distinguished *Chabolla-Hinojosa* “because the lesser offense in that case did not require the additional element of possession of a useable quantity.” *Id.* n.1.

J. WILLIAM BRAMMER, JR., Judge